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Supreme Court, U.S.
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No. 95-1094

In the Supreme Court of the United States

October Term, 1995

Darlene Banfield, Executrix
of the Estate of Harlow F. Banfield, et al.,
Petitioners,

vs.

Kenneth W. Turner, M.D., et al.,
Respondents.

BRIEF OF KENNETH W. TURNER, M.D., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BERNARD FINEMAN *Counsel of Record*
KELLIE S. KONTNIER
Aronson, Fineman & Davis Co., L.P.A.
124 East Fifth Street
East Liverpool, Ohio 43920
Telephone 216-385-3900
Attorneys for Respondent
Kenneth W. Turner, M.D.

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QUESTIONS PRESENTED FOR REVIEW

Whether the District Court properly granted, and the Court of Appeals affirmed, Respondent, Dr. Kenneth W. Turner's Motion for Summary Judgment when the Petitioners did not prove essential elements of their case, wherein the Record demonstrates Dr. Turner acted legally, appropriately and fairly in the administration of the plan and the distribution of plan benefits, and not in an arbitrary, capricious or fraudulent manner.

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Darlene Banfield, Executrix
of the Estate of Harlow F. Banfield, et al.,
Petitioners,

v.

Kenneth W. Turner, M.D., et al.,
Respondents.

BRIEF OF RESPONDENT, KENNETH W. TURNER, M.D., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF THE CASE

The United States District Court, Northern District of Ohio, Eastern Division, granted the Respondent, Kenneth W. Turner's Motion for Summary Judgment and found in its Memorandum and Order that although Kenneth Turner, M.D. was a Fiduciary of the Plan there was no indication he acted inappropriately or that any of Dr. Banfield's funds or contributions made to the AAELO Pension

Plan were misappropriated. The District Court, upon its review of the record, found evidence that Dr. Banfield made approximately 60 to 65% of the contributions and received the same percentage of benefits. The District Court, inter alia, relied upon the deposition testimony of Virginia Bennett, the secretary and bookkeeper of AAELO. Miss Bennett testified Dr. Banfield and Dr. Turner co-signed all checks issued by the Plan; neither could remove funds without the other's knowledge; and the doctors had an amicable relationship and trust in one another. Furthermore, throughout her 14 years of employment with AAELO, Miss Bennett testified she did not see any evidence of fraudulent or inappropriate conduct by Dr. Turner. The District Court also considered the report of a financial consultant hired by Dr. Banfield's Estate, who reviewed Dr. Banfield's Estate and financial files and was unable to find any evidence of fraud with regard to the administration of the pension plan. (R 56, p. 5)

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's Order after reviewing the matter de novo. The Court of Appeals recognized a fiduciary's decisions will be upheld under ERISA unless they are arbitrary or capricious. The Appellate Court found neither party had disputed Dr. Turner had discretionary authority and found Petitioners, herein, had not put forward any evidence to create a genuine issue of material fact regarding whether any of Dr. Turner's decisions were arbitrary or capricious. The Appellate Court further found Mrs. Banfield did not put forward any evidence of a fraud, misappropriation, or breach of contract by another fiduciary which Dr. Turner knowingly failed to stop.

The Appellate Court concluded the Petitioners had not carried their burden of coming forward with sufficient evidence to create a dispute of material fact and that Summary Judgment was correctly entered against them. (Appx. A, pp. 13-16)

ARGUMENT

The Respondent, Kenneth W. Turner, respectfully requests this Court deny the Petition for Writ of Certiorari because the Petitioner has not demonstrated compelling reasons for granting the Petition as required by Supreme Court Rule 10. In accordance with Rule 10, a Petition for Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. The Petitioners are alleging these exact errors as a basis for their Petition for Writ of Certiorari.

The District Court properly granted Summary Judgment to the Respondent, Kenneth W. Turner, in accordance with the provisions of Federal Rule of Civil Procedure 56. Rule 56(c) mandates the entry of a Summary Judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material facts as a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Cellotex v. Catrett* (1986), 477 U.S. 317; *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.* (1986), 475 U.S. 574.

In *Ershick v. United Missouri Bank, N.A.* (1991, 10th Cir.), 948 F. 2d 660, the Court of Appeals held, under ERISA, the decisions of a fiduciary will be upheld unless they are arbitrary and capricious and are not supported by substantial evidence, or are erroneous on questions of law. (see, also *Pokratz v. Jones Dairy Farm* (1985, 7th Cir), 771 F.2d 206. In cases involving discretionary plans, courts should not abandon the arbitrary and capricious standard nor create a separate abuse of discretion standard but instead the two terms should be used interchangeably. *Daniels v. Anchor Hocking Corp.* (1991), 758 F. Supp. 326. In *Tiemeyer v. Community Mut. Ins. Co.* (1992, S.D. Ohio), 789 F. Supp. 894, the District Court held where a fiduciary has a clear grant of discretionary authority, the arbitrary and capricious standard of review applies to his determinations.

McDaniel v. Blue Cross and Blue Shield of Alabama (1992), 780 F. Supp. 1363, aff'd, (1992, 11th Cir.) 977 F. 2d 599, held if the plain language of a plan gives the plan fiduciary discretionary authority to determine the eligibility for benefits or to construe the terms of the plan, then a court will review such determinations under the arbitrary and capricious standard, and under this standard, a fiduciary's decision is to be upheld unless the complaining party proves the decision is not reasonable or rationally based on facts.

Petitioners have not produced any evidence to show a misappropriation of Dr. Banfield's funds, monies or contributions to the AAELO Pension Plans. The report of the actuarial firm retained by Petitioners indicated Dr. Banfield's private practice income which he contributed to the plans flowed

through the plans to his benefit. Respondent, Dr. Turner, did not misappropriate the funds of the plans or defraud Dr. Banfield of any contributions or benefits due and owing to him.

Petitioners failed to meet their burden on essential elements of their case as they did not show Dr. Turner acted arbitrarily or capriciously in his discretionary capacity; nor were they able to prove decisions made by Dr. Turner were not reasonable or rational based upon the facts.

Respondent, Dr. Turner, believes other issues raised by Petitioners in their appeal do not relate to him, and therefore, his response thereto is not necessary.

CONCLUSION

The Respondent, Kenneth W. Turner, states the Petitioners have not demonstrated any basis for review by this Court in accordance with Supreme Court Rule 10. Petitioners have not asserted any errors on the part of the Court of Appeals as to the Respondent, Dr. Turner, to cause this Court to grant their Petition; nor, have Petitioners presented any other compelling reasons for review. This Respondent respectfully requests this Honorable Court deny the Petition for a Writ of Certiorari.

Bernard Fineman *Counsel of Record*
Kellie S. Kontnier
Aronson, Fineman & Davis Co., LPA
124 East Fifth Street
East Liverpool, Ohio 43920
Phone (216) 385-3900
Attorneys for Respondent
Kenneth W. Turner, M.D.